Lord Denning said in *Director of Public Prosecutions* v. *Head*[5] (at page 111) that if an order was void, it would in law be a nullity and there would be no need for an order to quash it as it would be automatically null and void without more ado. Lord Denning as Master of the Rolls so held too in *Regina* v. *Paddington Valuation Officer & Anor., Ex parte Peachey Property Corporation Ltd. (No. 2)*[6] (at page 402). The judgment of this court in *Pow Hing & Anor.* v. *Registrar of Titles, Malacca*[7] refers (at page 157) to the decision of the House of Lords in *London & Clydeside Estates Ltd.* v. *Aberdeen District Council & Anor.*[8] and a passage in the judgment of the Lord Chancellor, Lord Hailsham of St. Marylebone (at page 189) where he refers to a spectrum of possibilities as the legal consequence of non-compliance with statutory requirements and speaks of one extreme where there has been such an outrageous and flagrant violation of a fundamental obligation that what has been done may be safely ignored and treated as having no legal consequence and in the event of any reliance sought thereon the party affected is entitled to use the defect simply as a shield or defence without having taken any positive action of his own.

The decision of this court in *Land Executive Committee of Federal Territory* v. *Syarikat Harper Gilfillan Berhad*[9] to the effect that section 418 which provides for an appeal is the exclusive remedy of an aggrieved person or body against a decision *inter alia* of a Collector of Land Revenue and precludes any claim for declaratory relief, on which the respondent seeks to rely, has no application to the present proceedings as the decision sought to be impugned in that case was made within jurisdiction and was not a nullity. We reiterate the second order in the matter before us is invalid and wholly dehors the provisions of the Code and no appeal is therefore essential or necessary to impugn its validity and it can be subject to collateral attack in the instant proceedings.

THE RESULT

We accordingly for the reasons we have given allowed this appeal at the conclusion of argument, set aside the judgment of the learned judge, dismissed the respondent's claim and granted the appellant a declaration on the counterclaim that the first order is still subsisting and of full legal effect. We further made the necessary consequential order as a result, by agreement of counsel as we have earlier indicated, for the moneys lodged on fixed deposit in the name of the respondent's solicitors in satisfaction of the appellant's claim together with the accrued interest thereon to be paid out to the appellant in satisfaction of its claim under the charge and also ordered costs of this appeal and in the court below to the appellant in respect of the claim and counterclaim. The deposit lodged in court by way of security will be refunded to the appellant.

EPILOGUE

This case is yet another illustration of a bureaucratic botch by a misinformed land official in complete disregard of his functions and powers under the Code which has not only generated needless litigation, no doubt lucrative for the lawyers but certainly onerous and expensive for the parties, but also evoked an observation by the learned judge that the appellant should have made the Collector a party to these proceedings and be asked to pay it the disputed sum for further interest!

It is to be hoped, and it is expected, that it will not be necessary to repeat in the future the admonition administered in the peroration of the judgment of this court in *Pow Hing*[7] in perhaps even more trenchant terms or at all.

Appeal allowed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; James Foong & Co.*

CHI LIUNG HOLDINGS SDN. BHD. v. N.T.S. ARUMUGAM PILLAI

[O.C.J. (Arulanandom J.) September 5 & October 6, 1980; January 6 & February 3, 1981 and March 9, 1981]

[Penang — Civil Suit No. 295 of 1980]

Land Law — Specific Performance — Sale agreement — Application for transfer of Land.

Practice and Procedure — Specific Performance — When court will grant summary judgment — R.H.C. 1980, O. 81.

The plaintiff applied for an Order under Order 81 of the Rules of the High Court 1980 for specific performance by the defendant of a Sale Agreement dated March 10, 1978. The plaintiff sought for the transfer of the piece of land, Lot No. 2592 mentioned in the said Agreement to the plaintiff. The plaintiff had complied with the terms of the Agreement. He had paid the defendant a total of $400,000 to assist the defendant to clear his charge on the said land.

Under the said Agreement the defendant was obliged to execute a valid and registrable transfer and give possession of the said land to the purchasers.

The defendant claimed that it was a condition of the Agreement that the plaintiff give a friendly loan of $1,331,000 to the defendant. The defendant contended that the agreement was entered while he was under undue influence and that the executed Sale Agreement was different from the one the defendant had agreed to execute.

Held, allowing the plaintiff's claim: (1) it is only in a straightforward case where there is absolutely no defence can the court give summary judgment under Order 81 of the Rules of the High Court 1980;

(2) the plaintiff had performed as much of the contract as he could before the vendor transfer the said land. The defendant had accepted even the sum of $400,000 without protest and enjoyed the benefit of it. It would therefore be unconscionable to accept his defence as a *bona fide* defence and the case should go to trial. It was just a sham defence to help the defendant avoid having to perform his part of the contract.

Case referred to:-

(1) *Anglesey (Earl)* v. *Annesley* (1741) 1 Bro. Parl Cas. 289; 1 E.R. 573 H.L.

CIVIL SUIT.

A.R. Noor for the plaintiff.

Adam bin Mohamed Ibrahim for the defendant.

Arulanandom J.: This was an application by the plaintiff for an order under Order 81 of the Rules of the High Court 1980 for specific performance by the defendant of a Sale Agreement dated March 10, 1978 and that the defendant surrender his Title Deed described in Grant No. 2271 for Lot Nos. 2592 in Mukim II of Seberang Perai Selatan to the proper authorities for subdivision and transfer of the area of

175 acres the portion described in the said Sale Agreement to the plaintiff within fourteen days of the Order made herein failing which the Senior Assistant Registrar or some other fit and proper person may be appointed to do the same.

The plaintiff had already filed a writ against the defendant on June 20, 1980 and had claimed the same reliefs in its statement of claim.

In the affidavit in support of the application for summary judgment affirmed on July 22, 1980, Dato Harry Tong Lee Hwa a Governing Director of the plaintiff deposes that the defendant agreed to sell to the plaintiff a portion of the said land area 175 acres described in the Sale Agreement subject to terms and conditions stated therein. He also deposes that the plaintiff has complied with the terms and conditions of the said agreement and paid to the defendant a total of $400,000 excluding deposit payment of $1,000 to assist the defendant to clear his charge on the said land.

Under the terms of the Sale Agreement the defendant was obliged to execute a valid and registrable transfer and give possession (without vacant possession but the purchaser would be at liberty to evict each and every occupier) of the said land (described as C.T. No. 2271 Lot No. 2592 area approximately 175 acres in the Mukim II of Seberang Perai Selatan vide Annexure X portions shaded red read as A & C) to the purchasers free from all encumbrances and in consideration of the transfer the purchaser shall pay $1,000 to the vendor on signing the agreement and also transfer 1¾ houses free of costs (except legal and stamp duty expenses) to the vendor from every type of ten houses built on the said land or pay to the vendor in terms of cash 17½% at the prevailing market value of the said ten constructed houses.

In addition to this the purchaser under clause 13 of the agreement agreed to extend a loan of $400,000 to the vendor to enable him discharge the charge on the said land.

On the date of the hearing the plaintiff (purchaser) had complied with its obligations under the terms of this agreement insofar as these applied to matters which the plaintiff could attend to before the vendor transferred the said land to the plaintiff. The payment of $400,000 to the defendant had been accepted without any challenge.

The defendant resists the plaintiff's application on the following grounds:—

(1) That it was a condition of the agreement that the plaintiff give a friendly loan of $1,331,000 to the defendant.

(2) That the agreement was entered into while the defendant was subjected to undue influence by certain personalities in the State.

(3) That the executed Sale Agreement was different from the one the defendant had agreed to execute.

(4) That the agreement is not capable of being specifically enforced against the plaintiff and as such it cannot be specifically enforced against the defendant by virtue of section 20(1)(b) & 20(1)(g) of the Specific Relief Act, 1950 (Act 137). Section 20(1)(b) of the Specific Relief Act reads as follows: —

"(b) a contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications or volition of the parties, or otherwise from its nature is such, that the court cannot enforce specific performance of its material terms;"

Section 20(1)(g) of the Specific Relief Act reads as follows: —

"(g) a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from its date;"

On these grounds the defendant argues that the suit should go to trial. The law on the subject is very clear. It is only in a straightforward case where there is absolutely no defence can the court give summary judgment under Order 81. Again the court should not entertain sham defences.

The first objection about the friendly loan of $1,331,000 is only raised by the defendant in his letter of September 8, 1979 about a year and a half after the date of the agreement. It should also be noted that when the plaintiff first requested the defendant to perform his part of the agreement the defendant only said that the land could not be transferred for the reason that the Inland Revenue Department had lodged a caveat on the said land because of the defendant's tax liability to them. Be that as it may there is no evidence at all that this friendly loan was an integral part of the sale agreement as there is nothing in the agreement to even indicate that there was a further loan to be serviced. The only loan in the agreement was the loan of $400,000 which the plaintiff has paid. This court is of the opinion that the negotiations for the friendly loan of $1,331,000 were extraneous to the sale agreement and hence irrelevant in these proceedings.

(2) Re the question of undue influence there was no evidence at all of any undue influence. Furthermore the persons mentioned as exerting influence over the defendant were not parties to the contract for them to get any unfair advantage over him. The relations subsisting between the defendant and the persons named are not such as is envisaged by section 16 of the Contracts Act (Act 136) which reads as follows: —

"16.(1) A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another —

(a) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) (a) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that the contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

(b) Nothing in this subsection shall affect section 111 of the Evidence Act, 1950."

(3) As regards the objection that the Sale Agreement was different from what the defendant had agreed to execute, it has to be noted that the Sale Agreement was executed three days after a draft was prepared during negotiations. The Sale Agreement was read and the defendant's signature was attested by his own solicitor and the defendant cannot now go back and say he did not understand the contents nor that he did not agree to the terms.

(4) As to the last objection that the agreement is not capable of being specifically enforced against the plaintiff I find there is no merit in this. The agreement expressly provides that the plaintiff shall give $1\frac{3}{4}$ houses to the defendant of every ten houses or $17\frac{1}{2}\%$ of the market value of ten houses. So the alternative can be specifically enforced and need not involve continuous supervision by the courts.

Here as I stated earlier the plaintiff has performed as much of the contract as it could before the vendor transfers the said land. The defendant has accepted even the sum of $400,000 without protest or argument and enjoyed the benefits of it. As was stated in the case of *Anglesey (Earl)* v. *Annesley*[1]

"If an agreement is part performed by one of the parties, it is too late for the other to complain of fraud, surprise, etc., or attempt to set the agreement aside on that account; for a court of equity will decree specific performance of the remaining part of it."

It would therefore be unconscionable to accept his defence as a *bona fide* defence and have the case go to trial. It is just a sham defence to help the defendant avoid having to perform his part of the contract.

Under the circumstances and for reasons given above there will be judgment for the plaintiff in terms of the minutes annexed to the summons-in-chambers.

Application allowed.

Solicitors: *G.T. Rajan & Co.; Adam & Co.*

NG MOO YIN & ANOR. v. NG CHEE KONG & ANOR.

[O.C.J. (Arulanandom J.) September 24 & December 8, 1980; February 23, 1981 & April 27, 1981]

[Penang — Originating Motion No. 29 of 1980]

Practice and Procedure — Trust — Ex parte application for appointment as trustees — Order granted — No notice to other beneficiaries — Order set aside.

Estate and Trust — Trust — Appointment as trustees by ex parte application — No notice to other beneficiaries — Order set aside.

This was an application to set aside the Order of Court dated June 1, 1979 in Originating Summons No. 164 of 1979 appointing the respondents as trustees of the Estate of Ng Teik Thye (deceased). The said Order was made pursuant to an *ex parte* application by the respondents to be appointed trustees in place of the last surviving trustee of the said Estate.

Held, setting aside the Order: in spite of the fact that there were many other beneficiaries, the application of the respondents was made *ex parte* without notice being given to all other beneficiaries who had a right to be heard on the application. On this score itself, the applicants had a right to set aside the Order obtained *ex debito justitiae.*

ORIGINATING MOTION.

N.T. Vello for the applicants.

Goh Lim Eam for the respondents.

Arulanandom J.: This was an application by the applicants to set aside the Order of Court dated June 1, 1979 in Originating Summons No. 164 of 1979 appointing the respondents as trustees of the Estate of Ng Teik Thye (deceased).

The said Order was made pursuant to an *ex parte* application by the respondents to be appointed trustees in place of the last surviving trustee of the Estate of Ng Teik Thye (deceased) viz. Ng Kok Chan who died intestate on December 1, 1978.

Various allegations are made against the respondents in the affidavit of the applicants in support of the application. But these need not be considered here. The fact remains that in spite of the fact there were many other beneficiaries, the application of the respondents was made *ex parte* without notice being given to all other beneficiaries who had a right to be heard on the application. On this score itself the applicants have a right to set aside the Order obtained *ex debito justitiae.*

The court therefore set aside the Order dated June 1, 1979 in Originating Summons No. 164 of 1979 with costs.

Order accordingly.

Solicitors: *Chang & Vello; Goh Lim Eam & Co.*

HONG KEOW TEE & ANOR. v. ALKHARED & KHOO HOLDINGS SDN. BHD.

[O.C.J. (Arulanandom J.) April 21, 1980 & April 29, 1981]

[Penang — Originating Motion No. 6 of 1980]

Land Law — Caveat — Removal of Caveat — Effect of — National Land Code, s. 326(2).

On the strength of an agreement dated March 17, 1978 for the applicants to provide the pieces of land for the purpose of constructing and erecting dwelling houses, the respondents had lodged a caveat against the said land (hereinafter referred to at the first caveat). On October 18, 1979, the applicants caused a notice in Form 190 of the National Land Code to be served on the respondents for the removal of the first caveat. The respondents promptly applied by an *ex parte* Originating Summons dated November 9, 1979, for an extension of the said first caveat and on November 22, 1979, the said caveat was extended under section 326(2) of the National Land Code. However, the respondents had failed to serve the relevant order on the Registrar, as required by the provisions of section 326(2). The caveat was accordingly removed after the period allowed by the notice in Form 19C. When the respondents realized that this had happened they immediately caused a further caveat, No. 2310/79 (the subject matter of this application), to be lodged against the said pieces of land.

The question before the court was whether the respondents were entitled to lodge the second caveat (No. 2310/79) when the first had been removed.

Held, allowing the application: (1) once a caveat is removed, the removal is conclusive and it is extinguished forever;

(2) the caveat (No. 2310/79) should be removed forthwith.

Cases referred to:-

(1) *Damodaran* v. *Vasudeva* [1974] 1 M.L.J. 128, 129 & 130.

(2) *Arul Chandran* v. *Tara Rajaratnam* [1979] 2 M.L.J. 172, 174.